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# Estate Planning: Wills

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## ESTATE PLANNING: WILLS

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### WHAT IS A WILL?

A will is a written document that describes how its maker wants property distributed after his or her death. A will is the blueprint that guides the Circuit Court in the distribution of an estate. By making a will, an individual can decide who shall receive his or her property, how much each shall receive, when they shall own it and, to some degree, what they can do with it. A will has no effect during the testator's lifetime. Only upon death does a will disposing of the testator's property become effective in carrying out the plans and wishes detailed in the will. This fact sheet defines some of the legal terms used in wills and answers questions often asked about wills.

### DEFINITIONS

The language of wills seems foreign to a person who has never had one. Being familiar with legal terms makes a will easier to understand. A person who makes a will is called a *testator*. A person who dies is called a *decedent*. When a person dies leaving a will, he is said to have died testate. A person who dies without leaving a will dies *intestate*. A devisee is a person designated in a will to receive real or personal property. A *devise*, when used as a noun, is real or person-

al property given to another by will. When *devise* is used as a verb it means to dispose of real or personal property by will.

### WHO MAY MAKE A WILL?

A person eighteen (18) or more years of age who is of sound mind and not under undue influence may make a written will. Verbal or video taped wills are not legally recognized by South Dakota law. However, some attorneys are video taping the signing and witnessing of a will to help demonstrate the testator was of sound mind and not under undue influence.

### CAN A WILL BE CHANGED?

A will can be changed or revoked during the maker's lifetime, as long as he or she remains competent. One way to change a will is to revoke the will and make an entirely new will. Another way to change a will is to make a codicil (a supplement) that must be executed (signed and witnessed) just like a will is. Marking out or adding words to a will is not an effective way to change it. However, a portion of a will may be revoked by a person if that person performed a revocatory act on such portion of a will with the intent of revoking such portion of the will.



A will should be reviewed periodically, especially when there are changes in family or financial situations. Such circumstances include, but are not limited to, the following:

- marriage, remarriage, or divorce since the will was written
- birth of a child
- death of a devisee (beneficiary)
- naming different devisees (beneficiaries)
- naming a different personal representative
- moving to another state
- acquiring additional property
- changes in the title of property ownership
- passage of new South Dakota laws or federal estate tax laws
- increase in the value of property

#### **CAN A PERSON MAKE HIS OR HER OWN WILL?**

Yes, a person can make his or her own will, but it must be in the testator's own handwriting. This type of will is called a holographic will. Such a will is valid if the signature and the material provisions are in the handwriting of the testator.

Self-made wills, however, frequently increase costs and trouble for heirs. A handwritten will, just as any other, can be denied probate because of errors. Words used may not be interpreted by a court as intended by the testator.

In most cases, a lawyer can advise and assist a person in drafting a will that best suits his or her needs and one that avoids the legal pitfalls that can result from a "do-it-yourself" will. One should not rely on the advice of untrained relatives or friends who are not up-to-date on South Dakota laws regarding wills.

#### **DO I NEED TO NAME A GUARDIAN FOR MINOR CHILDREN?**

Yes! In your will you nominate a guardian for minor children and a conservator of the assets. *Guardianship* provides for the children's care until they reach maturity.

*Conservatorship* provides for management and distribution of the money and property left to

children until they reach the age of maturity. One person can perform both functions, or you may name one individual as the guardian and another as the conservator.

Some parents choose to leave the money and property to the children in a trust. A trust document states how you wish the money to be spent, who should be the trustee, and when the trust should terminate. One advantage of a trust is that it can terminate at any age you indicate in the trust document. That age could be well in excess of the age of majority, which is currently 18 in South Dakota. The trustee has the responsibility of writing out the checks for the children's living expenses, education, and other costs.

You could name a trusted family friend or relative who has money management experience, a bank, or a trust company as trustee. Further, you could name co-trustees. Sometimes people name the children's guardian and the friend or relative with money management experience as co-trustees. The trustee or co-trustees can make distributions to the children without court approval up to the limits outlined in the trust.

Selecting the right person may be the hardest part of setting up a guardianship. Consider choosing someone whose values, lifestyle and child-rearing beliefs are similar to yours. If you choose a couple and they should later divorce, be sure to review your guardianship preference. If you favor a single person who has a close relationship with the children and you feel comfortable with his or her lifestyle, this could be a good choice, too. Older children should be consulted, because those 14 and over can legally ask the court to appoint someone else as their guardian.

Lawyers recommend that you also name a backup guardian in case circumstances prevent your first choice from carrying out the obligation after your death.

Once you make your decision, take time to discuss freely all financial and child care arrange-

ments with the guardian or conservator you have chosen. Asking someone to raise your children may be an overwhelming request. Don't expect an immediate answer. Some people may not feel they can accept the added responsibility. You may have to ask someone else.

Don't hesitate to reevaluate your choice periodically, especially if personal and financial situations change for either you or the designated guardian or conservator. If you decide to change appointees, inform your current nominee and prepare either a new will or add a codicil (amendment) to your present will.

### IS A WILL MADE OUT OF STATE VALID IN SOUTH DAKOTA?

A written will is valid in South Dakota if executed (signed and witnessed) according to South Dakota law, the law of the state or country where the will was executed, or the law of the place where, at the time of death, the testator is domiciled, has a place of abode, or is a national.

### HOW MAY PERSONAL POSSESSIONS BE INCLUDED IN A WILL?

Nearly everyone has personal or heirloom possessions which he or she wants to hand down to friends or relatives. The South Dakota Uniform Probate Code contains a provision allowing a person to refer in his or her will to a separate listing which disposes of tangible personal property. Examples of tangible personal property would include rings, quilts, firearms and so on. The list cannot be used to dispose of cash, certificates of deposit, or securities.

The list is not a part of the will but separate from it. The list must identify both the items and the persons to receive them with reasonable certainty. The separate listing can be changed as new possessions are added without the formalities required for new wills or codicils. The list should be dated and must be signed each time a change is made.

Further information is available in the Extension fact sheet, *Who Gets Grandma's Yellow Pie Plate*.

### WHAT PROPERTY CANNOT BE DISPOSED OF BY A WILL?

Property owned by two or more persons in joint tenancy with right of survivorship will be owned, after the death of one, solely by the survivor(s). Proceeds from insurance policies, pension funds, U.S. Savings Bonds, P.O.D. (payable on death) or T.O.D. (transfer on death) deposits or other assets where a beneficiary is named cannot be disposed of by a will unless the estate is named as a beneficiary.

### ARE THERE RESTRICTIONS ON DISPOSING OF PROPERTY BY A WILL?

The right to pass property to anyone after death is a privilege granted by legislative action. Therefore, wills must be made within the limitations set by South Dakota law.

One important restriction prevents a testator from depriving his or her surviving spouse of a share of the property. A surviving spouse may elect to take a percentage of the augmented estate. An augmented estate is the estate reduced by funeral and administrative expenses, homestead allowance, family allowances and exemptions, and enforceable claims to which is added the sum of property that was transferred by the decedent without adequate compensation. For example, a father has all his property in joint tenancy with his son. If the father dies leaving his widow with nothing, she can claim a percentage (based on the length of the marriage) of the value of joint tenancy property that their son received after his father's death. (See fact sheet, *Probate*.)

### SHOULD A NON-EARNER SPOUSE HAVE A WILL?

After the death of one spouse, the survivor's estate will include his or her own property and usually all or part of the deceased spouse's estate. Therefore, it is just as important for a non-earner spouse to have a will as it is for the primary breadwinner, and for many of the same reasons. It is important that wills of spouses be coordinated according to how title to property is held (see fact sheet, *Estate Planning: Property Ownership*), as well as for tax planning.





### **MUST A PARENT LEAVE HIS CHILDREN ANYTHING?**

No. Children have no vested interest in their parent's property. If you have children, any or all may be disinherited. Parents do not have to leave a small sum such as a dollar to a child to show that he or she was not forgotten. Attorneys follow the practice of naming the children to show that the testator knew the "natural objects of his bounty" and had not forgotten any of them. Otherwise, a child could contest a will claiming that the parent was of unsound mind.

If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child may claim, under certain conditions, a share in the estate equal in value to that which he would have received if the testator had died without writing a will.

### **MUST A WILL BE WITNESSED?**

A holographic (handwritten) will does not have to be signed by witnesses. Other wills must be signed by two persons who witnessed either the signing of the will, or the testator's acknowledgment of the signature on the will. In all cases, the testator must sign the will.

Generally none of the beneficiaries should be a witness. An heir could contest a will claiming that the beneficiary witness unduly influenced the will maker.

### **WHAT IS A SELF-PROVED WILL?**

To make a will self-proved, an additional statement is added which states, in effect, that the testator and witnesses signed and acknowledged that this was the will. The testator and witnesses sign this statement before a notary who then signs and uses his or her official seal on it. This makes the will self-proving. When the will is submitted for probate, witnesses do not have to be present to testify concerning the execution of the will.

### **WHAT ARE THE DIFFERENCES BETWEEN JOINT, MUTUAL AND CONTRACTUAL WILLS?**

A joint will is one in which two persons express their testamentary dispositions in a single document. The intended result is the same as if each had made a will by a separate document. Unfortunately, as is witnessed by several cases which have found their way to the courts, the actual outcome in a joint will too often is not the same as was intended. A will is a sufficiently important document to merit the small amount of extra paper and effort necessary to make a separate one for each individual testator involved.

Mutual wills are the separate wills of two persons who have made reciprocal provisions for each other. For example, if a husband leaves all of his property to his wife by will and she, in turn, leaves all of her property by her will to him, their wills are said to be mutual. Some mutual wills are also joint wills. According to the Probate Code, a contract to make a will or devise, or not to revoke a will, can be established only by: 1) provisions of a will stating the material provisions of the contract; 2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or, 3) a writing signed by the decedent evidencing the contract.

### **WHAT IS THE EFFECT OF DIVORCE, ANNULMENT OR SEPARATION ON A WILL?**

Divorce or annulment revokes the disposition of property made by the will to the former spouse. A separation decree that does not terminate the status of husband and wife is not considered as a divorce under the South Dakota Uniform Probate Code. Any distribution made in a will to spouses who are legally separated pending divorce is still effective.

### IS LIFE INSURANCE A SUBSTITUTE FOR A WILL?

No. Life insurance is simply one kind of property that may be owned. If insurance is payable to an individual named as a primary beneficiary or a secondary beneficiary, a will has no effect on the proceeds. However, if life insurance is payable to the estate, the will governs the distribution of the proceeds. Life insurance proceeds are subject to the claim of the creditors when payable to the estate, but not if they are payable to beneficiaries.

### WHAT IS A PERSONAL REPRESENTATIVE?

A personal representative is the person named in a will to carry out settlement of the estate (formerly the term “executor” was used). Any qualified person (competent, age of majority) can be nominated as personal representative. A testator nominates the personal representative. The Circuit Court affirms the nomination by issuing letters of appointment.

An individual need not be a resident of South Dakota to qualify as personal representative, although it may be more convenient to use a resident. A personal representative can reside in another state or even in another country.

### IS JOINT TENANCY A SUBSTITUTE FOR A WILL?

No. Since the order of death and the amount of time between joint tenants’ deaths will affect whose heirs receive the estate, joint tenancy is not a substitute for a will. (For more information review fact sheet, Estate Planning: Property Ownership.)

In some cases and for certain types of property, such as residence shared by spouses, joint ownership may be useful as a legal tool in addition to a will. It results in property so owned “passing” directly to the surviving joint tenant upon the death of one or the other joint owners.

### WHERE SHOULD A WILL BE KEPT?

After a will is drafted, it should be stored in a safe place where it can be found. If a bank or trust company is named as personal representative, the will may be left with the institution for safekeeping.

Sometimes the attorney who drew the will can store it in his or her office safe. Simply because the will is stored with the attorney who drafted it does not mean that this individual has to be selected by the personal representative as the attorney to handle legal affairs of the estate. A personal representative can select any attorney for this function.

The original copy of the will should not be left in a desk drawer or other storage place around the home. It could be stolen or destroyed by fire. It could be found and destroyed by an heir who would receive more under the South Dakota law of intestate succession than he or she would under the will.

Although many people store wills in a jointly owned safe deposit box, careful consideration should be given to this choice. The joint tenant would have access to the box and could destroy the will if he or she would receive more under the laws of intestate succession.

South Dakota law also provides for storage of a will with the district court. Contact the Clerk of the Court in the county where you live for the correct procedure for storing wills. The will can be obtained by a testator or by a person authorized in writing signed by him to pick it up for the purpose of changing or destroying it.

### WHAT IS THE COST OF HAVING A WILL PREPARED?

Federal and state laws affecting taxation and estate planning have grown increasingly complex. The services of professionals fully competent in these fields are important. Attorney fees for legal assistance in making a will vary, depending



on the size of the estate and the complexity of the will. Most law firms do not have a set fee for preparation of a will. Attorneys usually base their fee on the length of conference time with the testator and the amount of time it takes to draft the will. Do not hesitate to ask an attorney for an estimate of his or her fee for preparing a will, preferably at the first meeting.

### IS A WILL FOR YOU?

A will is a written document that describes how you want your property distributed after your death. However, a will should not be constructed separate from the titles involved and the information on them. By making a will, you can decide for yourself who shall receive your property, how much each shall receive, when they shall own it and, to some degree, what they can do with it.

The drafting of a will or the related broader matter of estate planning involves decisions requiring professional skill and judgment, which can be obtained only through years of training, study, and experience. An attorney is the appropriate professional to consult to draft legal documents such as wills, trusts, or contracts that are suited for your individual situation.

### REFERENCE

South Dakota Codified Laws. Chapter 29A-2. *Interstate Succession and Wills*. Accessed April 5, 2005 from <http://legis.state.sd.us/statutes/index.aspx>

### DISCLAIMER

This publication is not intended to be a substitute for legal advice. Rather, it is designed to help families become better acquainted with some of the devices used in estate planning and to create an awareness of the need for such planning. Future changes in laws cannot be predicted, and statements in the fact sheet are based solely upon those laws in force on the date of publication.

### ACKNOWLEDGEMENTS

Use of this document for non-profit educational purposes is encouraged. This document may be linked to or reprinted if no endorsement of a commercial product, service or company is stated or implied, and if appropriate credit is given to the authors and the South Dakota State University Extension Service.

This publication is suggested for the reading of all South Dakotans. It has been reviewed and approved by the South Dakota Bar Association and South Dakota State University faculty in the Human Development, Consumer and Family Sciences Department, College of Family and Consumer Sciences, March 2005.

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